

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,

Plaintiff,

v.

TYSON FOODS, INC., *et al.*,

Defendants.

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Case No. 4:05-CV-329-GKF-PJC

**STATE OF OKLAHOMA’S OPPOSITION TO DEFENDANTS’ JOINT MOTION TO
STRIKE PORTIONS OF PLAINTIFF’S DAMAGES EXPERTS’ REPORT (DKT #1950)**

COMES NOW Plaintiff, the State of Oklahoma (“the State”), and respectfully submits this opposition to “Defendants’ Joint Motion to Strike Portions of Plaintiff’s Damages Experts’ Report” (Dkt. #1950) (“Defendants’ Motion”). Defendants’ Motion should be denied.

I. INTRODUCTION

Defendants seek, for a second time, to have stricken the State’s expert report on damages entitled “Natural Resource Damages Associated with Aesthetic and Ecosystem Injuries to Oklahoma’s Illinois River System and Tenkiller Lake” served on January 5, 2009 (hereinafter “CV Report”).¹ Specifically, Defendants seek to have stricken “any and all results, opinions, and conclusions based on representations or assumptions about proposals for alum treatments of Lake Tenkiller or any portion of the IRW, including but not limited to the Contingent Valuation (‘CV’) survey portion of the Stratus Consulting report.” (Motion at 2.) The CV survey is, of course, the cornerstone of the CV Report and the damages estimate contained therein. Thus, while Defendants couch their Motion in terms of seeking to strike “portions” of the Report, their

¹ Defendants first moved to strike the CV Report on the ground that the State had not fully complied with Fed. R. Civ. P. 26. (Dkt. #1938.) Because the Court required a supplemental “roadmap” as to trial testimony (which the State timely provided on April 10, 2009), Defendants’ first motion to strike was not successful. (See 4/14/09 Order (*Cleary, J.*).

intent, of course, is to strike the Report in its entirety. Their Motion is without merit and should be denied.

II. FACTUAL BACKGROUND

Because Defendants' Motion omits relevant factual background that directly undercuts their position, the State provides such a recitation here.

A. The CV Study

The State's team of internationally known experts in environmental economics, natural resource damage assessments, and survey methodology led by Stratus Consulting developed a survey that was administered to a large sample of Oklahoma residents. This work culminated in the CV Report, which provides – using the contingent valuation methodology – an estimate of the monetary value placed on aesthetic and ecosystem injuries to the Illinois River system and Tenkiller Lake from 2009 to 2058 for the Illinois River system and from 2009 to 2068 for Tenkiller Lake. The CV study, which was conducted over a more than two-year period, was undertaken within a framework of natural resource damage assessment (“NRDA”) as presented in the DOI's NRDA regulations (“CV Study”). (Dkt. #1853, Ex. D, CV Report, p. ES-1.) The CV Study developed a conservative measure of these damages, by estimating the mean willingness-to-pay for an alum treatment program that would return the flow of services from the Illinois River system and Tenkiller Lake to their 1960 condition 40 years sooner than without the program (“the scenario”). (*Id.*, p. 1-9.)

As stated in the CV Report, “[t]he presentation of the alum treatment program allowed respondents to make a choice about a well-defined, realistic tradeoff. Either they could greatly reduce the injury and pay the tax for the alum treatments or accept the natural recovery without the alum treatment and use their money for other purposes.” (Ex. C, CV Report, Page 1-7.) “The key to the survey is that respondents accept that the outcome can be secured at a given cost to themselves. It is

immaterial to the validity of the results whether the mechanism generating the outcome is fictitious as long as it is accepted by respondents.” (Ex. B, Hanemann Decl. ¶ 11; *see also* Ex. D, Tourangeau Decl. ¶ 7 (import lies in respondents’ understanding and accepting the scenario presented and believing their choices are consequential).)

B. The State’s Remediation Report Dated May 15, 2008

Because Defendants’ Motion rests in large part on their description of the State’s May 2008 remediation report, the State provides the following background with regard to that report.

On May 15, 2008, the State produced an expert report, prepared by State’s expert Todd W. King, entitled “Identification and Evaluation of Viable Remediation Alternatives to Address Injuries Related to Land Disposal of Poultry Waste Within the Illinois River Watershed” (“King Report”). (Ex. A.) The King Report “identifies and evaluates viable remediation alternatives that can be employed to mitigate or correct the injuries resulting from the Defendants’ land disposal of poultry waste within the Illinois River Watershed.” (*Id.* at 2.) Further, the objective was to “identify cost-effective and environmentally prudent means of remediation that can be employed to reduce the State’s injuries.” (*Id.*)

The remediation evaluation process that resulted in the King Report may be summarized as follows. *First*, a list of remedial action options (or “technologies”) that had the potential to aid in achieving one or more of the remediation goals was developed for each of three response regions within the IRW (as defined on page 5 of the Report), namely, (1) the watershed (land where poultry waste has been applied and impacted groundwater); (2) riverine (rivers and streams); and (3) Lake Tenkiller. (*Id.* at 5, 10.)

Second, the list was then screened for the following “technology primary screening criteria”: (1) effectiveness; (2) implementability; and (3) cost. (*Id.* at 10.)

Third, each remedial action technology on the initial list was ultimately characterized as one of the following:

- “NOT RETAINED”: technology eliminated because it was either (i) not expected to be effective, (ii) not expected to be implementable for the site, or (iii) deemed extraordinarily expensive or substantially more costly than another technology that addresses the same contaminant or concern;
- “REQUIRES ADDITIONAL INVESTIGATION AND ASSESSMENT”: option considered potentially effective and implementable, but additional investigation or assessment is required; and
- “RETAINED FOR REMEDIAL EVALUATION”: option retained.

(*See id.* at 10; *passim.*)

Alum treatment was one of the many technologies considered for each response region. (*Id.* at 12 (watershed), 16 (riverine), and 19 (Lake Tenkiller).) Although alum treatment was not retained as a potential technology for the riverine area, it was *retained as requiring additional investigation and assessment* for the watershed and Lake Tenkiller response regions within the IRW. (*Id.* at 12, 19.)

With regard to the watershed, the Report states the following about the potential use of alum:

3.2.1 Response Region: Watershed

3.2.1.2 Treatment

Chemical treatment of fields and pastures with alum (alum field application) — Aluminum sulfate (alum) has been reported to reduce the amount of soluble P [phosphorus] when used as a chemical treatment to poultry waste prior to spreading on fields (Moore et al., 2007). Alum is commercially available and the technology is implementable. However, the effectiveness of alum in immobilizing P in-situ to fields and pastures as found within the IRW has not been demonstrated on a large-scale basis. For this reason, this technology requires additional investigation and assessment.

Potentially, alum would be applied to land where poultry waste has been applied, and excess P persists. The long-term effectiveness of alum amended poultry waste was tracked as it was applied to several fields over seven years (Moore and Edwards, 2007) where reductions of soluble P were up to 87%. However, aluminum can potentially damage aquatic ecosystems and is potentially phytotoxic to plants at low pH. Moore and Edwards (2005) found the amounts of aluminum in runoff were similar from fields with plots applied with treated and untreated poultry waste. Additional studies would focus on quantifying the reduction in P runoff and leaching from fields and potential impacts to pH to determine if aluminum toxicity is of concern. CDM identified no long-term studies of alum applied directly to poultry waste impacted land to reduce P runoff and leaching.

Additional studies would address the effectiveness of alum application as it relates to the reduction in P loading to the watershed based on the following factors: application method, location, environmental impact, reduction in runoff P, reduction in leaching P, pH changes and potential toxicity of aluminum.
REQUIRES ADDITIONAL INVESTIGATION AND ASSESSMENT.

(Ex. A, King Report at 12.)

That same section of the Report goes on to state the following regarding alum:

With respect to the treatment of poultry waste prior to field application, Moore and Miller (1994) tested four forms of lime and alum and found treatment of poultry waste with alum, calcium oxide (CaO) and calcium hydroxide (Ca(OH)₂) effective at reducing P in runoff from fields fertilized with poultry waste. . . . Alum has been found to be more effective than lime in reducing P runoff in poultry waste studies.

(*Id.*)

With regard to the Lake Tenkiller response region, the Report states the following about the potential use of alum:

3.2.3 Response Region: Lake Tenkiller

3.2.3.2 Treatment

P inactivation with alum — Aluminum sulfate (alum) is commonly used in lakes as a treatment to reduce the flux of P from sediments (Cooke et al., 2005). This

treatment is commercially available, implementable, and potentially effective. However, in a reservoir, such as Lake Tenkiller, high dosages and repeated applications may be needed to be potentially effective in sequestering sediment P. With higher dosages, there is the potential for localized depression of pH with an associated potential increase in aluminum toxicity to aquatic life.

Alum treatment of Lake Tenkiller could potentially reduce the internal loading of P from lake sediments. Using alum typically increases the water clarity. Alum can be toxic to aquatic life at low pH (Cooke et al., 2005). Alum applications are generally effective in lakes from 5 to 15 years (Welch and Cooke, 1999). However, the duration of alum treatment effectiveness in a reservoir such as Lake Tenkiller will not be as long as [in] a lake and will be further reduced proportional to the additional P inputs from the Illinois River, Caney Creek and the Baron Fork. Therefore, the applicability of P inactivation with alum cannot be adequately evaluated until the final remedial measures for the watershed and riverine response regions have been identified in sufficient detail to determine future P and nutrient loadings to Lake Tenkiller.

REQUIRES ADDITIONAL INVESTIGATION AND ASSESSMENT.

(Ex. A, King Report at 19.)

III. ARGUMENT

Defendants improperly claim that (1) the use of alum has been “expressly rejected” in the State’s remediation report, (2) the CV Report proposes for the first time alum treatment as a remedial alternative, and (3) such proposal is untimely. (Motion at 2.) Defendants are wrong on all fronts.

A. The State’s Remediation Experts Have Not Rejected the Possibility of the Use of Alum.

As a threshold matter, Defendants argue that “the remedial report Plaintiffs served on May 15, 2008 expressly rejected the use of alum specifically because of its unproven effectiveness, its potential to damage aquatic ecosystems, and its toxicity to both plant and fish life.” (Motion at 2.) Defendants go on to claim that “Plaintiffs’ remedial alternatives expert Todd King specifically rejected the use of alum as an alternative in the IRW, both as to soil and to water.” (Motion at 5.) By making statements such as these, Defendants would have this

Court believe that the use of alum was considered and rejected for all purposes. Defendants' representations in this regard are, again, inaccurate and grossly misleading.

As described above in Section II.B, alum treatment was one of the considered technologies for each of the three response regions of the IRW. (Ex. A, King Report at 12 (watershed), 16 (riverine), and 19 (Lake Tenkiller).) While Defendants' argument suggests that alum treatment fell into the "NOT RETAINED" category for all three regions, this is simply not true. Although alum treatment was not retained as a potential technology for the "riverine" region, it *was retained as requiring additional investigation and assessment* for the watershed and Lake Tenkiller response regions. (*Id.* at 12, 19.)

In short, because the CV Report does not attempt to supplement the State's May 2008 remediation report, and because the State's remediation experts have *not* rejected the potential use of alum for all purposes as Defendants suggest, Defendants cannot prevail on their argument that the CV Report should be stricken because it untimely discloses alum treatment as a potential remedial measure.

B. The CV Report Does Not Serve as a Supplement to the Remediation Report.

Against this backdrop, Defendants' Motion treats the CV Report as some sort of supplement (and an untimely one) to the State's remediation report served in May 2008. Specifically, Defendants argue throughout their Motion that the CV Report *discloses* a "proposed alum treatment remedy." (Motion at 12.) This is simply not true. The CV Report does *not* attempt to set forth expert findings as to, for example, the effectiveness of alum treatment as a matter of aquatic science, etc. Instead, the CV survey used alum treatment as a mechanism within the contingent valuation framework to create a tradeoff for survey respondents in order to

elicit their valuation of a scenario outcome. (Ex. B, Hanemann Decl. ¶ 10.) The CV Report described the survey's presentation of an alum treatment program in this way:

The Solution: The solution introduced in the survey was a program to treat land and waters in the Illinois River watershed with alum, a substance that bonds with phosphorus and makes it unavailable to plants, including algae. The survey noted that many states have successfully used a similar program to reduce algae. The survey narrative explained that with alum treatments, it would take about 10 years for the river and 20 years for the lake to return to 1960 conditions, compared with 50 and 60 years, respectively, if alum was not applied. Hence, alum treatments would reduce the period over which the injuries would be present by 40 years for both the river and lake. Respondents were told that if alum treatments were implemented, the cost would be a one-time tax added to their state income tax bill next year.

The presentation of the alum treatment program allowed respondents to make a choice about a well-defined, realistic tradeoff. Either they could greatly reduce the injury and pay the tax for the alum treatments or accept the natural recovery without the alum treatment and use their money for other purposes. In Chapter 2 we discuss how tradeoffs of this type, which is the standard method used by economists, can be used to measure people's value for improvements to natural resources. *While the State is not actually proposing this specific alum treatment program at this time, the choice was posed to the respondent as an actual choice. Posing choices in this manner is standard practice in CV surveys* (Mitchell and Carson, 1989; Boyle, 2003).

(Ex. C, CV Report, Page 1-7 [emphasis added].)

C. Whether the State Ultimately Implements a Remediation Program That Includes Alum – and Whether Alum Would Ultimately Be an Effective Treatment – Is Irrelevant To the Validity of the CV Study.

Even putting aside Defendants' inaccurate recitation of the State's remediation report, Defendants' Motion rests on yet another false premise. Specifically, Defendants' Motion improperly assumes, without any basis, that the validity of the scenario presented to the CV survey respondents, the responses, and the resulting analysis is dependent upon (1) the effectiveness of alum treatment as a scientific matter and (2) the State's intent to actually use alum treatment on Lake Tenkiller or elsewhere in the IRW. Neither of these assumptions is tenable as a matter of survey methodology or economics, and Defendants present no support for

a contrary conclusion. They merely reflect Defendants' misunderstanding – or misstatement – of the State's use of the contingent valuation methodology. Simply put, whether the State ultimately implements a remediation program that includes alum – and whether alum would ultimately be an effective treatment – is irrelevant to the validity of the CV Study.

Attached hereto in opposition to Defendants' Motion are Declarations of Dr. Michael Hanemann, one of the State's economic experts, and Dr. Roger Tourangeau, one of the State's experts in survey methodology. (Exs. B and D.) These Declarations directly undercut Defendants' false premise described above.

Dr. Hanemann's Declaration provides in part:

- “The survey set forth in the CV Report measures what individuals would be willing to pay for a program to accelerate future improvements in public trust resources in the Illinois River System and Tenkiller Lake. To do this it presents a scenario in which the injuries in the Illinois River system and Tenkiller Lake could be reduced more quickly through a particular program using alum. This creates the tradeoff that serves to measure the Oklahoma public's monetary value for accelerating the reduction in future natural resource injuries. It is important that respondents find this tradeoff plausible and take it seriously.” (Ex. B, Hanemann Decl. ¶ 9.)
- “The alum scenario set forth in the CV study is *not* being used to design a restoration program for the Illinois River System and Tenkiller Lake; it is being used to create a tradeoff for survey respondents in order to elicit their truthful valuations of the scenario *outcome*, namely an accelerated reduction in future natural resource injuries to the Illinois River System and Tenkiller Lake.” (*Id.* ¶ 10.)
- “The key to the survey is that respondents accept that the outcome can be secured at a given cost to themselves. It is immaterial to the validity of the results whether the mechanism generating the outcome is fictitious as long as it is accepted by respondents.” (*Id.* ¶ 11.)
- “The use of a tradeoff based on a scenario which is seen by respondents as plausible, while actually containing factually inaccuracies, is a well accepted practice in stated preference analysis, including contingent valuation and choice experiments. It is a well-established and accepted method for achieving valid and reliable measurements of value.” (*Id.* ¶ 12.)

Dr. Tourangeau's Declaration provides in part:

- "In the survey discussed in the CV Report, survey respondents were informed about an alum treatment program for the Illinois River Watershed that could be paid for via a tax referendum. Regardless of whether the State ultimately implements an alum program and whether an alum program would be effective, the results of the survey are valid and reliable. Importantly, it is evident from the survey results that a large majority of the respondents understood and accepted the scenario and believed their choice was consequential." (Ex. D, Tourangeau Decl. ¶ 7.)
- "The use of the hypothetical alum scenario in the contingent valuation survey was necessary and appropriate under the standard, well-established practices of contingent valuation surveys, and of social science survey research more generally, and the results of the contingent valuation survey are valid and reliable. The use of a hypothetical scenario in no way renders the results of the study invalid or unreliable." (*Id.* ¶ 8.)

In further support of the State's position is the deposition testimony of the CV Report authors who have been deposed thus far by Defendants, namely, Mr. David Chapman, who was the Stratus Consulting project manager for the CV Study, and Dr. Tourangeau.²

For example, Mr. Chapman testified at deposition as follows:

Q: Did the team reach a conclusion about whether or not the alum treatments would return the water to the clarity that's described in your survey?

A: No, we reached a conclusion that presenting this information to the respondents at this time in the survey helped us measure what we were trying to measure, which is the individual's willingness to pay [to] undo the problem.

Q: So even if it was simply false, that adding alum, doing these alum treatments – strike that. Even if doing this alum program that you've described wouldn't return the water to the clarity levels of 1960, it wouldn't make any difference to the outcome of your survey?

MS. XIDIS: Objection to form.

² At the time of this filing, only the "rough" transcripts of Mr. Chapman's and Dr. Tourangeau's depositions are available.

A: There were multiple questions in there. I'm trying to figure out which ones to answer.

(Whereupon, the court reporter read back the previous question.)

A: What matters is what the respondents understood and did the respondents understand that the water clarity could be returned. If the respondents, which we think we did a very good job in describing the situation, describing effects and understanding how they reacted to that fix. That was fix not effects, as long as the respondents took this as being a plausible scenario to return the water clarity back to the conditions they cared about, then whether or not it was actually a program that could be actually implemented in this time frame wouldn't change those results.

(Ex. E, Chapman 4/6/09 Rough Transcript at 141:10-142:21.)

Dr. Tourangeau testified at deposition that "What was critical to us was to present a solution to people that was plausible, that they could understand and that they accepted, and we presented a solution involving alum and other steps the State would take, might take to restore the river and lake to 1960 conditions, and in order to obtain the information we needed, we presented the scenario."³ (Ex. F, Tourangeau 4/8/09 Rough Transcript at 53:8-15.) Dr. Tourangeau also stated: "What was important to us about the alum program was that people

³ The specific exchange, which began with the false premise that the State's restoration expert had not evaluated alum, went as follows:

Q: You presented the alum restoration program as something that would work, that the State was considering doing in order to solve this problem. Do you think it would have been important to the recipients to know that the State's restoration expert had not even evaluated it?

MS. XIDIS: Objection to form.

A: I think we've been over this a lost [sic] times. What was important to us about the alum program was that people thought it would solve the problem, that they understood it and they accepted it. The State – who was it – evaluation expert's view of it, I don't see it as relevant.

(Ex. F, Tourangeau 4/8/09 Rough Transcript at 123:7-19.)

thought it would solve the problem, that they understood it and they accepted it.” (*Id.* at 123:15-17.)

Simply stated, whether the State actually implements an alum treatment program and whether alum treatment is actually an effective, implementable, and cost-effective technology are considerations that are irrelevant to the validity of the CV Study and resulting CV Report, as reflected in the Declaration of Dr. Hanemann, the Declaration and deposition testimony of Dr. Tourangeau, and the deposition testimony of Mr. Chapman. Accordingly, the cases Defendants cite on page 15 of their Motion for general principles regarding the bounds on the admissibility of expert testimony are inapposite.

D. The State’s January 2009 Disclosures Are Complete.

Defendants further argue on pages 16-18 of their Motion that the expert opinions and survey results set forth in the CV Report should be stricken “because the disclosure regarding alum treatment in the Stratus report [CV Report] fails to meet the requirements for expert disclosure” under Fed. R. Civ. P. Rule 26(a)(2). (Motion at 16.) This argument is a non-starter. The CV Report does not – and does not attempt to – set forth findings concerning the effectiveness of alum treatment. Accordingly, Defendants’ argument that the CV Report does not comply with Rule 26(a)(2) because none of the CV Report authors will be offered to testify as to the effectiveness of alum treatment is a red herring.

E. Defendants Do Not Argue That the CV Report Will Fail to Help the Trier of Fact. Thus, Their Motion Must Be Denied.

Finally, although it is not mentioned in Defendants’ Motion, it cannot be forgotten that “the touchstone of the admissibility of expert testimony is its helpfulness to the trier of fact.” *Gust v. Jones*, 162 F.3d 587, 594 (10th Cir. 1998) (internal quotation marks omitted); *see also Structured Dev.*, 2001 U.S. Dist. LEXIS 26323, at *6-7 (“The threshold determination when

ruling on [a motion to strike an expert's report] is whether expert testimony will likely help [the] trier of fact understand and evaluate the material facts of a particular issue. *See* Fed. R. Evid. 702.”). The absence of such a determination warrants the denial of a motion to strike an expert report. *Structured Dev.*, 2001 U.S. Dist. LEXIS 26323, at *7.

Defendants do not argue that the CV Report will fail to help the trier of fact understand and evaluate the issues. Defendants have had the opportunity to determine, clarify, or make further inquiry into the Stratus authors, facts, and methodologies underlying the CV Report. “As a result, Defendants’ arguments are meritless,” *id.* at *7, and their Motion to Strike must be denied.

IV. CONCLUSION

Based on the foregoing, the State respectfully submits that Defendants’ Joint Motion to Strike Portions of Plaintiff’s Damages Experts’ Report (Dkt. #1950) should be denied in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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